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There was no proper Bill of Exceptions before the Court 21

The Record failed to show that it contained all of the evidence 22

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There were no rates or tariffs of other pipe line companies sufficient to furnish a basis for imposing a tax in connection with the oil which was carried by Respondent 50

If the Commissioner in determining, for the purposes of taxation, the charge which the Respondent would or should have made for transporting the oil which it carried for Cosden & Company, without making any charge therefor, if it had received payment therefor, had any right, power or authority to use or consider the rates or tariffs of other pipe line companies, he had no right, power or authority to use or consider said rates or tariffs, save and except insofar as the same applied to "gathering charges" 53

If there was any error in the judgment of the Trial Court with reference to the 99,590.31 barrels of oil which was sold by Cosden & Company to the Pierce Oil Company, it was in finding and adjudging that the Respondent was liable for a tax in connection therewith upon the basis of 5c per barrel and in not holding that the Respondent was not liable for any tax whatsoever in connection with such oil, which, insofar as the Petitioner is concerned, was a harmless error. And the Circuit Court of Appeals erred in holding that the tax with respect to this particular oil should have been based upon a gathering charge of 12-1/2c 56

If this Court should conclude that both the Trial Court and the Circuit Court of Appeals erred with respect to the basis of the taxes in connection with any or all of the four classes of oil involved herein and that the usual and customary charges for the carriage of such oil was the correct basis, then we submit that under the Trial Court's Twenty-Fifth and Twenty-Eighth Findings of Fact the maximum basis for the tax is 12-1/2c 58

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1933.

No. 54

ACEL C. ALEXANDER, COLLECTOR OF INTERNAL REVENUE, *Petitioner,*

vs.

COSDEN PIPE LINE COMPANY, A CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF *for* RESPONDENT.

Statement.

From November 1, 1917, to December 21, 1921 (the period covered by the Revenue Acts of 1917 (40 Stat. 300) and 1918 (40 Stat. 1057)), Respondent, an oil pipe line company, collected $3,601,751.19 for oil transported by it, and under said acts collected and paid to the government taxes in the sum of $255,329.30. The Commissioner of Internal Revenue, claiming that the amounts charged by Respondent for the carriage of said oil were too small, made an addi-

tional assessment in connection therewith, in the sum of $235,967.23, which was paid under protest. This action was instituted to recover said additional assessment.

Subsequent to the commencement of the action, the Commissioner voluntarily refunded $16,931.34 of said additional assessment, thereby eliminating portions of the oil involved therein, and upon the trial of the case the Respondent, by reason of the comparatively small amounts thereof, introduced no evidence as to certain other oil involved, so that the case was submitted to the Trial Court with respect to only the four following classes of oil:

1. Prior to the passage of the Revenue Act of 1917, *when there was no tax upon the transporation of oil by pipe line,* the Respondent was carrying oil for Cosden & Company for a charge of 5c per barrel, which it continued to do between November 1, 1917, and March 31, 1919. The aforesaid act became effective on November 1, 1917, and between that date and March 31, 1919, Respondent transported for Cosden & Company 2,022,248.41 barrels of oil, *and in good faith made and collected therefor a charge of 5c per barrel,* and voluntarily paid the Government a tax of 5% of the amount so charged and collected, but the Commissioner made and collected an additional assessment of $15,066.87, in connection therewith, which was obtained by raising the charge from 5c to 20c per barrel (R. 38);

2. Between November 1, 1917, and March 31, 1919, Respondent transporated for Cosden & Company 3,666,048.38 barrels of oil, *but neither made nor collected any charge therefor,* but thereafter the Commissioner assessed and collected from the Respondent the sum of $36,666.50, which was obtained by computing a tax of 5% on a rate of 20c per barrel on the said 3,666,048.38 barrels of oil (R. 38);

3. The Revenue Act of 1917 was superseded by

the Revenue Act of 1918, which became effective on April 1, 191[illegible] and between that date and December 31, 1921, Respondent transported for Cosden & Company 20,644,020.34 barrels of oil *and in good faith made and collected therefor a charge of 10c per barrel,* and voluntarily paid the Government a tax of 8% of the amount so charged and collected, but thereafter the Commissioner made and collected an additional assessment of $170,946.04, which was obtained by *raising the charge made and collected* by the Respondent, for the said 20,644,020.34 barrels of oil from 10c per barrel to 20c per barrel, and of said additional sum of $170,946.04 the sum of $5,793.76 was refunded to the Respondent after the commencement of this suit, thus leaving in controversy the sum of $165,152.28 of said additional assessment (R. 39); and

4. On the 12th day of November, 1917, Cosden & Company under written contract sold to the Pierce Oil Corporation 99,590.31 barrels of oil, which was located in a tank or tanks near Cushing, Oklahoma, and which had been gathered into said tank or tanks by the Respondent from a lease or leases near Cushing, Oklahoma, and pursuant to the aforesaid written contract the Pierce Oil Corporation laid and connected its own lines to the aforesaid tank or tanks and transported said 99,590.31 barrels of oil away. Respondent never made or collected any charge whatsoever in connection with said oil, but thereafter the Commissioner assessed against and collected from the Respondent the sum of $995.90, which said assessment was obtained by levying a tax of 5% on a rate of 20c per barrel for the transportation of said 99,590.31 barrels of oil (R. 24).

Prior to the passage of the Revenue Act of 1917 there had been no tax on the transporation of oil by pipe lines, and from January 1, 1922, on which date the Revenue Act of 1918 was repealed by the Revenue Act of 1921 (42 Stat.

320), until the enactment of the 1932 Revenue Act, there was no such tax.

The case at bar was tried to the Trial Court upon a written waiver of a jury (R 9-10). At the close of the trial the Court took the case under advisement, and subsequently made Special Findings of Fact and Conclusions of Law (R. 23-32).

The Respondent's evidence in the Trial Court consisted of *(1)* an Agreed Statement of Facts, shown at pages 37 to 42 of the Record; and, *(2)* certain oral and documentary evidence shown at pages 42 to 80 and also pages 109 to 110 of the Record.

The Petitioner introduced no evidence whatsoever upon the trial of the case other than four Exhibits, which were copies of the published pipe line tariffs of the Texas Pipe Line Company, and which said Exhibits are shown at pages 80 to 94 of the Record.

The Trial Court found as a matter of law that the rate of 5c per barrel charged for the 2,022,248.41 barrels of oil comprising the first of the above classes of oil was the correct basis, and that the additional assessment of $15,066.87 in connection therewith was void; that the basis of 20c per barrel for the 3,666,048.38 barrels of oil comprising the second of the above classes of oil was erroneous, that the correct basis was 10c per barrel, and that $18,333.25 of the $36,666.50 assessment in connection therewith was void; that the rate of 10c per barrel charged for the 20,644,020.34 barrels of oil comprising the third of the above classes of oil was the correct basis, and that the additional assessment of $170,946.04 in connection therewith was void; and that the basis of 20c per barrel for the 99,950.51 barrels of oil

comprising the fourth of the above classes of oil was erroneous, and that the correct basis was 5c per barrel, and that $746.93 of the $995.90 additional assessment in connection therewith was void. (R. 23-32)

The Circuit Court of Appeals concluded that the judgment of the Trial Court with reference to the first and third of the above classes of oil was correct but that the assessment in connection with the second of said classes of oil was legal, and that the assessment in connection with the fourth of said classes of oil should have been upon the basis of 12½c per barrel instead of 5c per barrel. Accordingly, the Circuit Court of Appeals required the Respondent as a condition to the affirmance of the judgment of the Trial Court to remit the sum of $18,333.25 in connection with the second class of oil and $375.71 in connection with the fourth class of oil, which was complied with, whereupon the judgment of the Trial Court, as modified, was affirmed. (R. 128-132, 63 Fed. (2d) 663.)

The Basis of the Additional Assessments Involved Herein.

The additional assessments involved herein were made on or about August 2, 1922, and the basis of said assessments is disclosed by the letter of August 2, 1922, from the Commissioner to the Respondent, which said letter appears at pages 54 to 56 of the Record. The following are the pertinent portions of said letter:

> "Gentlemen: This office is in receipt of a report from Deputy Collectors, Acre and Evans, relative to an investigation of your company completed on May 19, 1922, from which additional tax of $235,967.23 was found due under Section 500 (e), Revenue Act of 1918, covering the movement of oil by pipe line.

"This report states that your company acts *as a purchasing agent* and transports all oil for Cosden & Company, the latter being the refining company. * * * The investigating officers report that all oil handled by your company for the companies mentioned above was *within a small radius of the plant or refineries of the said companies* with the exception of a few shipments where your company set up a higher rate on account of greater distance. The report indicates that your company does not hold itself out as a common carrier and has no public tariff for the movement of oil by pipe line, although *it has gathered and transported oil for various companies at various rates.* It is reported, however, that the services performed by your company are similar in many respects to the services performed by common carrier pipe line companies operating in the same fields. The deputies, for purposes of tax computation, have fixed the following rates as applicable:

	Gathering.	*Transporting.*	*Total.*
"Cosden & Company	12½c	7½c	20c
* * *	*	*	*
Pierce Oil Corporation	12½c	7½c	20c

"After careful review of the report submitted, this office considers that the deputies have computed the tax on a fair and just basis, and the Collector at Oklahoma City, Okla., is being instructed to get in touch with you, etc. * * *

Respectfully,

D. H. Blair, Commissioner."

Important Facts Established by Trial Court's Findings, the Evidence or Agreement of the Parties.

1. The Respondent is and has been since September, 1914, an Oklahoma corporation; and since its incorporation it has continuously maintained and operated oil pipe lines in the State of Oklahoma, but not elsewhere. (R. 37)

2. Cosden & Company is an Oklahoma corporation, and has been such since September, 1914; and that at all times subsequent to its incorporation it has been engaged in operating an oil refinery at Tulsa, Oklahoma. (R. 37)

3. From November 1, 1917, to March 31, 1919 (the period covered by the 1917 Revenue Act), Respondent *collected* $580,301.10 for oil carried by it and collected taxes for the Government in the sum of $29,200.66. The Commissioner assessed and collected from Respondent for oil so carried by it between November 1, 1917, and March 31, 1919, a tax in the sum of $90,064.37, being the sum of $60,863.71 in excess of the amount of tax collected by Respondent. The additional sum so assessed and collected included the sum of $4,838.40, obtained by raising *the charge made by Respondent* against Cosden & Company for 645,120.64 barrels of oil owned by Cosden & Company and carried by Respondent for it from 5c per barrel, *which was the charge made against and collected from Cosden & Company,* to 20c per barrel, and *this amount of $4,838.40 has been refunded to the Respondent.* The additional sum so assessed and collected also included $15,066.87 obtained by raising *the charge made by Respondent* against Cosden & Company for 2,022,248.41 barrels of oil transported and delivered by Respondent to Cosden & Company from 5c per barrel, *which was the charge made by Respondent to Cosden & Company,*

to 20c per barrel. The additional sum so assessed and collected also included $2,125.69 obtained by raising *the charge made* against Inland Refining Company for oil carried by Respondent and owned by the Inland Refining Company, from 7c per barrel, *which was the charge made and collected from the Inland Refining Company*, to 12½c per barrel, and this amount of $2,125.69 has been refunded to the Respondent. The additional sum so assessed and collected also included the sum of $36,660.50 obtained by computing the tax on a rate of 20c per barrel on 3,666,048.39 barrels of oil transported by Respondent and delivered to Cosden & Company at Tulsa, Oklahoma, *without making a charge* for such transportation. In addition to the refunds above mentioned there was refunded to the Respondent the sum of $590.80 of the additional taxes assessed against and paid by the Respondent on account of oil transported for the Atlantic Petroleum Corporation, the Duluth Oil and Gas Company, Great American Refining Company, and other companies during the period from November 1, 1917, to March 31, 1919. (R. 37-38)

4. By making the refunds referred to in the preceding paragraph the Commissioner has admitted that the charge of 5c per barrel which was made and collected by the Respondent for the carriage of the above referred to 645,120.64 barrels of oil for Cosden & Company, and the charge of 7c per barrel, which was made and collected by the Respondent for the carriage of the above referred to oil for the Inland Refining Company, were proper charges for carrying said oil; and he has likewise admitted that the charges made by the Respondent for carrying oil for the Atlantic Petroleum Corporation, Duluth Oil and Gas Company, Great American Refining Company, and other companies,

except Cosden & Company, during the period from November 1, 1917, to March 31, 1919, were proper. (R. 37-38)

5. The approximate distance the Respondent carried the 645,120.64 barrels of oil owned by Cosden & Company and referred to in the second preceding paragraph was 44 miles, which was the average length of all of the Respondent's pipe lines from Tulsa, Oklahoma, where the refinery of Cosden & Company was located. (R. 27, 41)

6. The additional assessment of $60,865.71 made against the Respondent for the carriage of oil by it from November 1, 1917, to March 31, 1919, included $995.90 for 99,590.31 barrels of oil, which the Commissioner in making said additional assessment, determined that the Respondent carried for the Pierce Oil Corporation and made no charge therefor, and said additional assessment of $995.90 was obtained by computing the tax on a rate of 20c per barrel on said 99,590.31 barrels of oil; that said oil was collected in a tank on a tank farm of Respondent's near Cushing, Oklahoma, and was carried by Respondent to said tank farm from the lease or leases from which the same was produced, and which said lease or leases were located in the vicinity of Cushing, Oklahoma; that said oil was sold to the Pierce Oil Corporation by Cosden & Company on or about the 12th day of November, 1917, under a written contract, and the same was delivered to the said Pierce Oil Corporation in the aforesaid tank; and that thereafter the Pierce Oil Corporation connected its lines to the aforesaid tank and carried said oil away. (R. 24)

7. The 99,590.31 barrels of oil referred to in the preceding paragraph was never at any time transported or carried by the Respondent, within the meaning of the Rev-

enue Acts of 1917 or 1918, except from the various leases on which the same was produced to the Respondent's tank farm, and that the rate then in effect as between Respondent and Cosden & Company for such service was 5c per barrel. (R. 31)

8. From April 1, 1919, to December 31, 1934 (the period covered by the 1918 Revenue Act), Respondent *collected* $2,821,450.09 for oil transported by it and collected taxes for the Government in the sum of $226,128.64. The Commissioner assessed and collected from Respondent for oil so transported by it between April 1, 1919, and December 31, 1921, a tax in the sum of $401,232.16, being the sum of $175,103.52 in excess of the amount of tax collected by Respondent. The additional sum so assessed and collected included the sum of $170,946.04 obtained by raising *the charge made by Respondent* against Cosden & Company for 20,644,020.34 barrels of oil transported by Respondent and delivered to Cosden & Company at Tulsa from 10c per barrel, *which was the charge made to Cosden & Company*, to 20c per barrel, and of this amount the sum of $5,793.76 has been refunded to Respondent. The additional sum so assessed and collected also included the sum of $1,695.96 obtained by raising *the charge made by Respondent* to Inland Refining Company for 401,680.93 barrels of oil owned by Inland Refining Company and carried for it by Respondent from 7c per barrel, *which was the charge made and collected from Inland Refining Company*, to 12½c per barrel, and this amount of $1,695.95 has been refunded to Respondent. The additional sum so assessed and collected also included $71.30 obtained by raising the *charge made and collected* against Inland Refining Company for certain other oil owned by Inland Re-

fining Company and transported by Respondent from 12c per barrel, *which was the charge made and collected by Respondent,* to 12½c per barrel, and this amount of $71.30 has been refunded to Respondent. The additional sum so assessed and collected also included $887.01 obtained by raising *the charge made and collected by Respondent* from Pierce Oil Company for 110,877.17 barrels of oil sold by Cosden & Company and transported and delivered by Respondent to Pierce Oil Company from 10c per barrel, *which was the charge made and collected,* to 20c per barrel, and this amount of $887.01 has been refunded to Respondent. The additional sum so assessed and collected also included $175.72 obtained by raising *the charge made and collected* from Pierce Oil Company for 43,930.95 barrels of oil carried for it by Respondent from 15c per barrel, *which was the charge made and collected,* to 20c per barrel, and this amount of $175.72 has been refunded to Respondent. The additional sum so assessed and collected also included $206.51 obtained by raising *the charge made and collected* from Pierce Oil Company for 103,257.56 barrels of oil carried for it by Respondent, from 17½c per barrel, *which was the charge made and collected,* to 20c per barrel, and this sum of $206.51 has been refunded to Respondent. The additional sum so assessed and collected also included $62.21 obtained by raising *the charge made and collected* from Pierce Oil Company for 155,546.47 barrels of oil carried for it by Respondent from 22c per barrel, *which was the charge made and collected,* to 22½c per barrel, and this sum of $62.21 has been refunded to Respondent. The additional sum so assessed and collected also included $1.47 obtained by raising *the charge for oil carried by Respondent* for the Four Gasoline Company from 12c per barrel to 12½c per

barrel, and this sum of $1.47 has been refunded to Respondent. In addition to the refunds mentioned above there was refunded to Respondent the sum of $636.41 of the additional taxes assessed against and paid by it on account of oil transported for the Great American Refining Company and other companies during the period from April 1, 1919, to December 31, 1921 (R. 38-40).

9. By making the refunds referred to in the preceding paragraph the Commissioner has admitted that all of the charges that were made by the Respondent for the carriage of oil between April 1, 1919, and December 31, 1921, for all parties *other than Cosden & Company* were proper, although some of said charges were as low as 7c per barrel (38-39).

10. The refunds referred to in the foregoing paragraphs Nos. 3 and 8 were made by the Commissioner subsequent to the commencement of the case at bar (R. 41).

11. Notwithstanding the fact that Cosden & Company owned all of the stock of the Respondent, the Respondent at all times *from a date several months prior to November 1, 1917* (the effective date of the 1917 Revenue Act), to July 1, 1918, *actually charged, collected and received* from Cosden & Company 5c per barrel for all oil carried by it for the said Cosden & Company during said period of time (R. 25).

12. The respondent neither made any charge against, nor collected nor received anything from Cosden & Company for any oil carried by it for the said Cosden & Company between July 1, 1918, and March 31, 1919 (R. 25).

13. Notwithstanding the fact that Cosden & Company owned all of the stock of the Respondent, the Respondent at all times from April 1, 1919, *to the present time,* or at

least to the date of the trial of the case at bar, to wit: the 30th day of April, 1930 (more than eight years after the repeal of the Revenue Act of 1918), *actually charged, collected and received* from Cosden & Company 10c per barrel for all oil carried by it for the said Cosden & Company during said period of time (R. 25).

14. All of the oil carried by the Respondent for Cosden & Company from November 1, 1917, to December 31, 1921, was owned by Cosden & Company from the time it entered the lines of the Respondent and it commenced the carriage thereof, and insofar as the Respondent acted in connection with the purchase of said oil it did so as the agent of Cosden & Company and it never at any time owned said oil (R. 25).

15. The rate of 5c per barrel which the Respondent charged and collected from Cosden & Company for the carriage of 2,022,248.41 barrels of oil referred to in the foregoing paragraph No. 3 was, under all of the circumstances, reasonable (R. 29-30).

16. The rate of 10c per barrel which the Respondent charged and collected from Cosden & Company for the carriage of the 20,644,020.34 barrels of oil referred to in the foregoing paragraph No. 8 was, under all the circumstances, reasonable (R. 29-30).

17. A rate of 10c per barrel for the carriage of the 3,666,048.39 barrels of oil referred to in the foregoing paragraph No. 3, which was carried by the Respondent for Cosden & Company, and for which no charge was made, was, under all of the circumstances, a reasonable charge to be used as a basis for determining the amount of tax in connection with the carriage of such oil (R. 29-31).

18. The principal business of the Respondent from November 1, 1917, to December 31, 1921, was that of carrying oil for Cosden & Company, and in establishing the above referred to rates of 5c and 10c per barrel for the carriage of oil by the Respondent for Cosden & Company it was the purpose and intention of said companies to make the charge or charges sufficient to take care of the actual cost and expense of the services rendered (R. 28).

19. Except for the year 1920, the charges which the Respondent made against and collected and received from, Cosden & Company for the carriage of all oil carried by it for the said Cosden & Company, except where no charge or charges were made, were sufficient to take care of the operating expenses in connection with the carriage of such oil, or, in other words, the actual cost and expense of carrying said oil (R. 25, 26, 28).

20. The Respondent's revenues from all of the oil carried by it, except for the year 1920, and except where no charge or charges were made for the carriage of oil, were sufficient to take care of its operating expenses in connection with the carriage of such oil, or, in other words, the actual cost and expense of carrying said oil (R. 25).

21. The average of all charges made by Respondent for the carriage of all oil carried by it from November 1, 1917, to March 31, 1919, for all parties other than Cosden & Company was 13c per barrel, and from April 1, 1919, to December 31, 1921, was 16.4c per barrel (R. 26).

22. The average of all charges made by the Respondent for the carriage of all oil carried by it from November 1, 1917, to March 31, 1919, for all parties other than Cosden & Company, but including the 645,120.64 barrels of oil carried

by the Respondent for Cosden & Company during said period, and for which it made a charge of 5c, and which the Commissioner by making a refund in connection therewith has conceded was a proper charge, was 11.74c per barrel (R. 26).

23. The average of all charges made by the Respondent for the carriage of all oil from November 1, 1917, to March 31, 1919, for all parties, including Cosden & Company, was 9.5c per barrel, and from April 1, 1919, to December 31, 1921, was 11.17c per barrel (R. 26-27).

24. Of all the oil carried by the Respondent between November 1, 1917, and March 31, 1919, 63% was carried for Cosden & Company and 37% was carried for other parties, and between April 1, 1919, and December 31, 1921, 81% was carried for Cosden & Company and 19% was carried for other parties (R. 27).

25. If the Respondent had charged 20c per barrel for all oil carried by it for all parties from November 1, 1917, to December 31, 1921, both its "operating" and "net" profits would have been exorbitant (R. 27-28).

26. The average of the actual costs and expenses of carrying oil by the Respondent was 7.8c per barrel for 1918, 7.6c per barrel for 1919, 10.7c per barrel for 1920, and 8.8c per barrel for 1921 (R. 27).

27. The Respondent has never held itself out as a common carrier; has never filed or published any rates or tariffs for the carriage of oil; and the State of Oklahoma has never required it to file or publish any such rates or tariffs (R. 24).

28. Common carrier pipe lines, which transport oil, have what is commonly known as a trunk or main pipe line,

divided into tariff stations, at each of which is located a pumping station, and in addition to such trunk or main pipe line, such carriers have what are called "gathering lines", through which oil is transported to their trunk or main pipe line. Such pipe line companies do not accept or receive oil in their main or trunk pipe lines at any place other than at a tariff station. The Respondent accepted and received oil anywhere along its lines that it was able to obtain same, regardless of pump stations. Common carrier pipe line companies make a charge, known as a "gathering charge," for carrying oil through their gathering lines, which is a flat rate or charge, being the same by the same carrier in the same field, regardless of whether the distance the oil is carried be small or great, and in addition thereto, make a charge known as a trunk line charge for carrying oil through their trunk lines from one tariff station to another, which charge is based upon the distance between the tariff stations (R. 28, 40-41).

29. The Respondent's system of pipe lines constituted a "gathering system," and nothing more, and said system was only comparable to the "gathering system" or "gathering lines" of common carrier pipe lines, and that the service of services rendered by the Respondent, as compared with the service or services rendered by common carrier pipe lines was nothing more than a "gathering service" (R. 29).

30. The usual and customary gathering charge of common carrier pipe lines operating in the vicinity of Respondent's pipe lines during the period from November 4, 1917, to December 31, 1921, was from 12c to 12½c per barrel (R. 28).

31. There was no pipe line company operating in the vicinity of Respondent's pipe lines which had any rates or tariffs sufficient to furnish a basis for imposing, either under the 1917 or the 1918 Revenue Act, any transportation tax for the carriage of oil by Respondent (R. 32).

Our Construction of the Revenue Acts Involved Herein.

The construction which we place upon the Revenue Acts involved herein may be summarized as follows, to wit:

Referring particularly to the applicable portions of the Revenue Act of 1918, the Respondent contends:

1. That where an oil pipe line company transports oil for another company, although an affliated company, and makes and collects an actual bona fide charge therefor, the tax liability of said pipe line company is necessarily predicated upon and limited by the charge actually made and collected, regardless of whether said charge was large or small or sufficient or insufficient to yield a profit for the services rendered, and that it is only where "*no charge*" whatsoever is made that the Commissioner has any right, power or authority to ascertain or determine, for the purpose of taxation, the charge or charges that would or should have been made;

2. That where an oil pipe line company transports oil for another company, and, regardless of the reason therefor, makes "*no charge*" for such transportation, the Commissioner, for the purpose of taxation, is authorized to determine the charge or charges which said pipe line company should or would have made and collected if it had "received payment for such transportation," in the following manner:

(a) If the charge which should or would have been imposed if such pipe line company had received payment for such transportation, can be determined "from actual bona fide rates" or "actual bona fide tariffs" of such pipe line company, then and in that event the Commissioner is confined solely and exclusively to such "actual bona fide rates" or "actual bona fide tariffs" and has no right, power or authority to consider the "rates or tariffs of other pipe line companies for like services";

(b) In the event, and only in the event, that the charge which said pipe line company should or would have made if it had received payment for such transportation cannot be determined from its own "actual bona fide rates" or "actual bona fide tariffs," then the Commissioner is authorized to determine such charge "on the basis of the rates or tariffs of other pipe lines for like services"; and,

(c) In the event, and only in the event, that such charge cannot be ascertained or determined by one or the other of the two preceding methods, then the Commissioner is required to ascertain and determine such charge "on the basis of a reasonable charge for such transportation."

While there are some differences in the wording between the applicable provisions of the Revenue Act of 1917 and those of the Revenue Act of 1918, said provisions of said Acts are substantially and practically the same, and we make the same contentions with reference to the 1917 Act that are enumerated in the preceding paragraphs pertaining to the 1918 Act.

We will hereafter develop and apply the foregoing contentions to the facts of the case at bar.

ARGUMENT AND CITATION OF AUTHORITIES.

Hereafter we will advance and argue the following propositions:

1. *None of the errors assigned in the Circuit Court of Appeals by the Petitioner, save and except that the judgment of the Trial Court was contrary to the Agreed Statement of Facts and said Court's Findings of Fact and Conclusions of Law, was reviewable for the following reasons:* (a) *There was no proper Bill of Exceptions before the Court; and* (b) *the Record failed to show that it contained all of the evidence.*

2. *Until the case at bar reached the Circuit Court of Appeals the Internal Revenue Department placed the same construction upon the 1917 and 1918 Revenue Acts and their relation to the two involved classes of oil, where a charge for the carriage thereof was made by the Respondent, as does said Respondent.*

3. *As to the two classes of oil which were transported by the Respondent for Cosden & Company between November 1, 1917, and December 31, 1921, and for which Respondent charged 5c and 10c per barrel, respectively, the Commissioner had no right or authority under the Revenue Act of 1917 or the Revenue Act of 1918, to impose any tax other than upon the basis of said charges of 5c and 10c per barrel, and therefore the judgment of the Trial Court with reference to said classes of oil and the affirmance thereof by the Circuit Court of Appeals are correct.*

4. *If there was any error in the judgment of the Trial Court with reference to the oil which was transported by*

the Respondent for Cosden & Company between November 1, 1917, and March 31, 1919, and for which the Respondent made no charge, it was in finding and adjudging that the Respondent was liable for a tax in connection therewith upon the basis of 10 cents per barrel instead of 5 cents per barrel, which, insofar as the Petitioner is concerned, was a harmless error. And the Circuit Court of Appeals erred in holding that the Commissioner's assessment in connection with this particular class of oil was legal.

5. *If there was any error in the judgment of the Trial Court with reference to the 99,590.31 barrels of oil which was sold by Cosden & Company to the Pierce Oil Company, it was in finding and adjudging that the Respondent was liable for a tax in connection therewith upon the basis of 5c per barrel and in not holding that the Respondent was not liable for any tax whatsoever in connection with such oil, which, insofar as the Petitioner is concerned, was a harmless error. And the Circuit Court of Appeals erred in holding that the tax with respect to this particular oil should have been based upon a gathering charge of 12-1/2c.*

6. *If this Court should conclude that both the Trial Court and the Circuit Court of Appeals erred with respect to the basis of the taxes in connection with any or all of the four classes of oil involved herein and that the usual and customary charges for the carriage of such oil was the correct basis, then we submit that under the Trial Court's twenty-fifth and twenty-eighth Findings of Fact the maximum basis for the tax is 12-1/2c.*

While the argument which we will present under the foregoing propositions will incidentally answer the contentions advanced in the Petitioner's Brief, we will, neverthe-

less, after concluding the presentation of said propositions, advance certain specific answers to said contentions.

I.

None of the errors assigned in the Circuit Court of Appeals by the Petitioner, save and except that the judgment of the Trial Court was contrary to the Agreed Statement of Facts and said Court's Findings of Fact and Conclusions of Law, was reviewable for the following reasons: *(a)* There was no proper Bill of Exceptions before the Court; and, *(b)* the Record failed to show that it contained all of the evidence.

There was no proper Bill of Exceptions before the Court.

Since all of Petitioner's Assignments of Error in the Circuit Court of Appeals, save and except the sixth, were based on rulings made during the trial of the case at bar, said assignments could not be reviewed in the absence of a proper Bill of Exceptions. (R. 122-123)

Although the Record in the Circuit Court of Appeals contains what is denominated a "Bill of Exceptions," it is obvious that the same is not a Bill of Exceptions. It will be noticed that the pretended Bill of Exceptions, commencing at page 36 of the Record and extending to page 120, sets out the testimony of the witnesses, in question and answer form, sets out colloquies between counsel, and between counsel and the Trial Court, and includes a number of exhibits set out in full. It is, therefore, clear that said "Bill of Exceptions" pays no attention whatsoever to Rule No. 10, subdivision 2, of the Circuit Court of Appeals.

The Circuit Court of Appeals has, without exception, enforced the aforesaid rule and has repeatedly held that a

purported Bill of Exceptions which does not conform thereto will not be considered. See *Zurich General Accident & Liability Ins. Co., Ltd.*, v. *Mid-Continent Petroleum Corp.*, 43 F. (2d) 355; *Tingley* v. *United States*, 34 F. (2d) 1; *Davis* v. *United States*, 38 F. (2d) 631.

We, therefore, insist that since there was no proper Bill of Exceptions in the Record, the only question open for review by the Circuit Court of Appeals, as well as this Court, is whether or not the judgment of the Trial Court was sustained by the Agreed Statement of Facts and the Findings of Fact of said Court. See Sec. 875, U. S. C. A., title 28; *Norris* v. *Jackson*, 9 Wall. 125, 19 L. ed. 608; *Preston* v. *Prather*, 137 U. S. 604, 34 L. ed. 788; *Van Meter* v. *United States*, 47 F. (2d) 192.

The Record failed to show that it contained all of the evidence.

Another equally conclusive reason for limiting the consideration of the judgment of the Trial Court to the sufficiency of the Agreed Statement of Facts and Findings of Fact of said Court to support said judgment, is the fact that the Record did not purport to contain all of the evidence, but purports to contain only the evidence material to the Petitioner's assignments of error. (R. 119) See *Krauss Bros. Lumber Co.* v. *Andrew W. Mellon*, 276 U. S. 386, 72 L. ed. 620; *Rasmussen, et al.*, v. *United States*, 8 F. (2d) 948; *Fales* v. *New York Life Ins. Co.*, 98 Fed. 234; *City of Milwaukee* v. *Shailer & Schniglau Co.*, 91 Fed. 726.

II.

Until the case at bar reached the Circuit Court of Appeals the Internal Revenue Department placed the same construction upon the 1917 and 1918 Revenue Acts and their relation to the two involved classes of oil, where a charge for the carriage thereof was made by the Respondent, as does said Respondent.

In the Trial Court the Petitioner conceded the correctness of the construction which the Respondent places upon the above Revenue Acts in their relation to the two involved classes of oil transported by Respondent for Cosden & Company, and for which it made charges of 5c and 10c per barrel respectively, *if said oil was owned by Cosden & Company.* In other words, in said Court the Petitioner, as to the two above classes of oil, defended the case solely and exclusively upon the ground that said oil belonged to the Respondent and that, therefore, the case presented a situation in which the carrier transported its own oil, in which event the Commissioner, under the aforesaid Revenue Acts, was not bound by the charge set up by the carrier on its books, but was authorized to ascertain and determine, in accordance with the provisions of said Acts, what was a proper charge for carrying such oil. The case was both tried and briefed on this theory, namely, that the aforesaid oil belonged to the Respondent, and then, inasmuch as the Trial Court in its sixth and other Findings of Fact (R. 25) specifically found and adjudged that the aforesaid oil was owned by Cosden & Company from the time it entered Respondent's lines, thereby precluding the Petitioner from further contending that said oil was the property of Respondent, the Petitioner hit upon a new theory, one not

presented in the Trial Court, namely, that by reason of the relationship existing between Cosden & Company and the Respondent the Commissioner was not bound by the charge which the Respondent made and collected for the carriage of said oil.

Likewise, the Commissioner committed the Government to the proposition that if the above oil was owned by Cosden & Company, the transportation tax in connection therewith was limited to the respective charges of 5c and 10c per barrel which were made by the Respondent against and collected from Cosden & Company for the transportation thereof.

In paragraph 7 of the Agreed Statement of Facts it is, among other things, stipulated and agreed as follows:

> "From November 1, 1917, to March 31, 1919, plaintiff *collected* $580,301.10 for oil carried by it and collected taxes for the Government in the sum of $29,200.66. The Commissioner of Internal Revenue assessed and collected from plaintiff for oil so carried by it between November 1, 1917, and March 31, 1919, a tax in the sum of $90,064.37, being the sum of $60,863.71 in excess of the amount of tax collected by plaintiff. *The additional sum so assessed and collected included the sum of $4,838.40 obtained by raising the charge made against Cosden & Company for 645,120.64 barrels of oil owned by Cosden & Company and carried by plaintiff for it from 5c per barrel, which was the charge made against and collected from Cosden & Company, to 20c per barrel, and this amount of $4,838.40 has been refunded to the plaintiff.*" (R. 37-38)

The above referred to refund of $4,838.40, which, according to the Record (R. 41), was made after the commencement of this action, can be explained on no other basis

than that the oil involved in said refund was "owned by Cosden & Company.". Consequently, if the two above referred to classes of oil were "owned by Cosden & Company," which was specifically found by the Trial Court to be the fact, it necessarily follows that the additional assessments in connection with said two classes of oil, according to the Commissioner's own theory, were illegal. In other words, the refusal of the Commissioner to refund said additional assessments was due solely and exclusively to his mistaken conclusion, found to be such by the Trial Court, that said two classes of oil belonged to the Respondent and not Cosden & Company.

There can be no doubt that the above referred to refund of $4,838.40 was due solely to the fact that the oil involved in said refund was owned by Cosden & Company, but in further substantiation of such fact we would direct the court's attention to the letter of September 5, 1929, from the Commissioner to the Respondent, which said letter advised the Respondent of the making of the aforesaid refund, as well as other refunds, and explained the reason or reasons therefor, which said letter was introduced in evidence as Respondent's "Exhibit 5," and which appears at pages 62 to 66 of the Record. The following is the paragraph of said letter which pertains to the aforesaid refund of $4,838.40:

> "Your claim is allowed for $4,838.40, tax paid under the 1917 Act of 645,120.64 barrels of oil *owned by Cosden & Co.*, and transported for it by you *for a charge of 5c per barrel* whereas this additional tax of $4,838.40 was computed on a rate of 20c per barrel. *It is held that under the 1917 Act on this oil owned by Cosden & Co., the tax should attach on the basis of the actual charge made*, that is, the $1,612.80 tax originally paid by you on this movement is correct and the ad-

ditional tax of $4,838.40 assessed and collected is excessive and therefore allowed."

Therefore, inasmuch as the Trial Court specifically found that the oil involved in the two above referred to classes *was owned by Gosden & Company,* and not by the Respondent, there can be no question but what, according to the theory of the Commissioner, the tax in connection therewith should have been predicated upon, to use the language of the Commissioner, "the basis of the actual charge made" for the carriage thereof, to-wit, 5c and 10c per barrel, respectively, and that the additional assessments of $15,066.87 and $170,946.04 in connection therewith were illegal.

The following additional paragraphs from the above referred to letter of the Commissioner also quite conclusively disclose that it was his position and theory that where oil was transported by the Respondent, for either an affiliated or a non-affiliated company, *and such oil belonged to the party for whom the same was transported,* and a charge for carrying the same was *actually made and collected,* he was compelled to compute the tax on the basis of the charge *actually made:*

"It appears that you originally paid tax of $2,669.51 on 762,688.94 barrels of oil *belonging to* and transported for the Inland Refining Co. *at a rate of 7 cents per barrel.* Additional tax of $2,125.69 was collected from you on this movement on the theory that the tax should be computed on a 12½c per barrel gathering charge. *Investigation now discloses that this oil belonged to the Inland Refining Co. and the $2,669.51 originally paid on actual charges for the gathering service is considered correct. The additional tax of $2,125.69 is therefore excessive and allowed.*

* * * * * * * *

"Your claim is also allowed for $71.30 representing the excess tax collected by reason of computing tax on a 12½-cent per barrel basis instead of on a 12-cent per barrel basis as applied to 177,750.90 barrels of oil *owned* by the Inland Refining Company and transported by you for a *flat contract price of 12 cents per barrel.* It appears that tax in this instance should properly be computed at a rate of 12 cents per barrel and your claim is accordingly allowed for $71.30. You have in correspondence with the Bureau indicated that $163.60 had been overpaid by you on movements of oil for the Inland Refining Co. Your contention can be allowed only for the $71.30 applying to the 177,750.90 barrels *due to the fact that the balance of the oil involved in your contention which was moved for the Inland Refining Co. did not belong to it but was your property while in the course of transportation* and the regular gathering charge of 12½c per barrel has therefore been used for purposes of tax computation.

* * * * * * * * *

"The $206.51 additional tax paid on 103,257.56 barrels of oil *owned* by and moved for the Pierce Oil Co. at *a flat rate of 17-1/2 cents per barrel* is conceded to be erroneously paid in view of the fact that you have previously accounted for tax on the 17½ cents per barrel charge. Your claim is accordingly allowed for $206.51."

The above referred to letter of the Commissioner unquestionably establishes:

(1) That the additional assessments involved herein were made by the Commissioner upon the theory that where a carrier transported oil, whether for an affiliated or a non-affiliated company, and the charge made for such carriage, although an actual and bona fide charge, was less than what the Commissioner deemed to be, under the circumstances, a reasonable charge, he was at

liberty to impose a tax upon the basis of what he concluded was a reasonable charge.

(2) That upon further reflection the Commissioner reached the conclusion that where oil was transported by a pipe line company for either an affiliated or non-affiliated company, and a charge, whether large or small, or reasonable or unreasonable, was actually made for such transporation, he was limited in assessing a tax under the Acts involved herein to the charge actually made and collected by the carrier.

In addition to the foregoing, we would call attention to the letter of September 6, 1921, of A. C. Holden, Acting Deputy Commissioner, outlining instructions with reference to the assessment of taxes under the acts involved (Petitioner's brief, pages 23-26). Paragraph "(10)" of said instructions reads as follows:

> "*(10)* Where a legitimate charge is made for the service rendered, such charge is the basis on which the tax is computed."

Unless this Court concludes that the position and theory of the Commissioner, as well as that of the Petitioner in the Trial Court, to the effect that if the two classes of oil under consideration were owned by Cosden & Company, as was found to be the fact by the Trial Court, and the Respondent actually made and collected a charge for transporting the same, the tax was limited to such charge, were and are unsound, and permits the Petitioner to change front, there can be no escape from the conclusion that the additional assessments in connection with said two classes of oil were illegal, and that the Trial Court was not in error in rendering judgment for the amounts of such assess-

ments, and that the Circuit Court of Appeals was not in error in affirming the same.

III.

As to the two classes of oil which were transported by the Respondent for Cosden & Company between November 1, 1917, and December 31, 1921, and for which Respondent charged 5c and 10c per barrel, respectively, the Commissioner had no right or authority under the Revenue Act of 1917 or the Revenue Act of 1918, to impose any tax other than upon the basis of said charges of 5c and 10c per barrel, and therefore the judgment of the Trial Court with reference to said classes of oil and the affirmance thereof by the Circuit Court of Appeals are correct.

Both the 1917 and the 1918 Revenue Acts include different kinds of carriers, and in order to make the statutes clear in their application to the carirage of oil, we will here set out the portions of the 1918 Act which apply thereto:

Section 500 of said Act authorizes the collection of "*(e)* a tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of oil by pipe line."

In Section 501 of said Act it is provided "that the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered." Then, in the latter part of said Section 501 appears the following:

> "The tax imposed by subdivision (e) of section 500 shall apply to all transportation of oil by pipe line. *In case no charge for transportation is made,* by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would

be imposed if such person received payment for such transportation, and if the tax cannot be computed from actual bona fide rates or tariffs, it shall be computed *(1)* on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or *(2)* if no such rates or tariffs exist, on the basis of a reasonable charge for such transportation, as determined by the Commissioner."

In Section 502 of said Act it is made the duty of the carrier to collect the tax and pay the same to the Government.

It is to be noticed from the foregoing statutes that where the carrier makes a charge for the transportation of oil, the only tax authorized is the 8% on the amount *paid to it for the transportation.* There is nothing in the law authorizing the assessment and collection of any *additional* tax under these circumstances. The only case in which the Government is allowed to asses a tax on any other basis than the charge actually made by the carrier is *where no charge whatsoever is made by the carrier.* There is not the least ambiguity whatever in the statute, since Section 500 only authorizes a tax of 8% on the amount paid for the transportation and the latter part of Section 501 only applies to the one situation of oil transported without any charge whatsoever. The language is entirely clear and certain. Hence, there was no power whatever given the Commissioner by the statute to increase returns based on transportation for which a charge was made, on the theory that a higher charge should have been made. It was only in the absence of all charge that he was entitled to consider what charges should have been made. Hence, the situation insofar as the carriage of oil for which a charge was actually

made and collected is concerned comes clearly within the repeated holdings of this Court that an authorization to tax under certain conditions will not be extended by construction to authorize a tax under different conditions: *U. S.* v. *Whitridge*, 230 U. S. 144, 58 L. ed. 159; *Gould* v. *Gould*, 245 U. S. 151, 62 L. ed. 211; *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 66 L. ed. 391; *U. S.* v. *Field*, 255 U. S. 257, 65 L. ed. 617.

That this is the correct interpretation of the Act of 1918, is apparent from a comparison of the provisions of that Act, above quoted, with the like provisions of the Act of 1917. It will be noticed that the form of language used in the two Acts is about the same until we get to the part of Section 501 which relates to the carriage of oil. Oil is not specifically mentioned in Section 501 of the 1917 Act, but pipe lines are grouped with other carriers, and it is provided that "in case such carrier does not because of its ownership of the commodity transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such commodity *if the carrier received payment for such transportation.*"

Now, it is possible to regard this last provision as authorizing the Government to demand a tax on the theory that the pipe line company did not charge a rate sufficiently high, although this construction seems highly questionable in view of the fact that Section 500, subdivision (d), authorizes a tax on "*the amount paid* for the transportation of oil by pipe line."

With reference to Section 501 of the 1917 Act, the Circuit Court of Appeals said:

> "The language, 'in case such carrier does not * * * receive the amount which as carrier it would otherwise charge,' has reference only to cases where no charge is made. This is clearly indicated by the context. A carrier could not charge itself for services rendered to itself. Hence, if it owns the commodity carried, no charge could be made. Therefore, the specifically enumerated reason for not receiving the amount it would otherwise charge, *viz.*, 'ownership of the commodity transported,' would arise only in a case where no charge was made. That provision and the closing clause of the sentence, 'if the carrier received payment for such transportation,' clearly indicate Congress was dealing with cases where no charge is made."

If there was a doubtful question in the Act of 1917, it was entirely eliminated by the change made when Section 501 was redrafted into the form in which it appears in the Act of 1918. As to carriers generally, the provision of Section 501 of the law of 1918 remains the same as in the Act of 1917, but now pipe line companies are differentiated from other carriers, and reads in reference to the transportation of oil that "*in case no charge for transportation is made*, by reason of ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax which would be imposed if such person received payment for such transportation, and if the tax cannot be computed from actual bona fide rates or tariffs, it shall be computed *(1)* on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner, or *(2)* if no such rates or tariffs exist, on the basis of a reasonable charge for such transportation, as determined by the Commissioner."

This change in language must be taken as indicating that Congress had some purpose in view. Obviously the intention was to exclude any question of imposing a tax on a basis other than *the payment received, when payment was in fact made*, for carriage, and to limit the Government's power of collecting on any other basis to the one case of where no charge whatever was made for the carriage of the oil.

The law is very well settled that where a statute does not provide for a tax liability none exists. This is the holding of this Court in the case of *Iselin* v. *United States*, 270 U. S. 245, 70 L. ed. 566, where it was held that the law relating to taxation of the sale of theatre tickets had no application to the particular situation presented. The court speaks as follows:

> "But the act contains no provision referring to tickets of the character here involved; and there is no general provision in the act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States* v. *Weitzel*, 246 U. S. 533, 543, 62 L. ed. 872, 874, 38 Sup. Ct. Rep. 381;

Peoria & P. U. R. Co. v. *United States*, 263 U. S. 528, 534, 535, 68 L. ed. 427, 430, 431, 44 Sup. Ct. Rep. 194."

It is very clear that the tax imposed by the Act under consideration is in no sense a tax against the carrier. The statutes expressly provide that the tax is against the owner of the oil or goods transported. And when a carriage charge is in fact made and collected from the owner of the oil, the relation of the carrier to the Government is not that of taxpayer, but that of a collecting agent of the Government.

The Second Circuit Court of Appeals, in the case of *Nolte* v. *Hudson Nav. Co.*, 8 F. (2d) 859, involving the question of whether the Government was entitled to a prior lien against an insolvent carrier under a federal statute giving such a lien for taxes, held that the obligation against the carrier for the tax which it had collected was not a liability for taxes and hence that the Government did not have a prior lien. The opinion is a somewhat extended one and cites numerous cases from this Court and from the state courts sustaining the conclusion reached. The court speaks as follows:

> "It seems to us too clear for argument that the Acts of Congress involved herein impose a tax upon the person transported or upon the shipper of freight to be carried. The tax is not imposed on the carrier but on the person or thing carried. And it is equally clear that the carrier is made a collector of the tax, and the duty is laid upon it to pay the amount which is thus collected to the collector of internal revenue of the district in which the carrier has its principal office or place of business.
>
> "A tax is a pecuniary burden imposed for the support of government. The courts have said again and

again that a tax is not a debt nor in the nature of a debt. It is not, as is a debt, founded on contract or agreement. It is an impost levied by authority of the government upon its citizens or subjects for the support of the state. The taxpayer is the one upon whom the pecuniary burden is imposed and whose duty it is to make payment. The burden of making payment here rests on the traveler or shipper. The duty of collecting it and then paying over the amount collected rests on the carrier it is true, but this does not make the carrier a taxpayer as distinguished from a tax collector."

We, therefore, reiterate that since the Trial Court specifically found *(a)* that the two above referred to classes of oil were owned by Cosden & Company, and not the Respondent; *(b)* that the Respondent actually made and collected a charge, to-wit, five cents and ten cents per barrel, respectively, for the carriage of such oil; and, *(c)* that such charges were made in good faith and, under the circumstances, were reasonable, which findings are conclusive upon this Court, the Commissioner was wholly without authority to impose any additional assessment or assessments in connection therewith (R. 25, 26, 29-31).

It may be admitted that where a charge for carriage of oil is purely fictitious the Commissioner would not be limited to such charge in imposing a tax. But that is not this case.

In the Brief of the Petitioner he repeatedly refers to the charges of 5c and 10c per barrel for the carriage of oil as being "nominal" charges, but we submit that such charges are substantial, and not "nominal."

As evidence of the fact that the above charges of 5c and 10c per barrel were made in good faith, it is sufficient

to point to the fact that for several months prior to the passage of the 1917 Revenue Act, and before there was any transportation tax law, the Respondent was charging Cosden & Company 5c per barrel for the carriage of oil; and, of course, no inference of bad faith can possibly be predicated upon the fact that subsequently the charge of 5c was increased, in fact doubling to 10c per barrel, which necessarily resulted in increasing the tax liability. And in this connection it might not be amiss to call attention to the further fact that notwithstanding the fact that the 1918 Revenue Act ceased to be effective on December 31, 1921, from which date until the enactment of the 1932 Revenue Act there was no tax upon the transportation of oil by pipe line, the Respondent at all times between March 31, 1919, and the date of the trial of the case at bar, charged Cosden & Company 10c per barrel for the carriage of its oil (R. 47-48).

As evidence of the fact that the above referred to charges of 5c and 10c per barrel were actual and bona fide charges and not mere bookkeeping entries or fictitious charges, it is sufficient to call attention to the testimony of Mr. Thompson, the accountant of Respondent (R. 47-49, 70-71), and Mr. Perry, its Vice-President (R. 73), to the effect that said charges were not only actually made and charged by the Respondent, but were actually collected and received by it.

We might call the Court's attention to other portions of the evidence which established that the Respondent actually made and collected a charge for the carriage of all of the oil involved in the two classes of oil under consideration, that such charges were made in good faith, and

were free from fraud, and that under the circumstances the same were reasonable, but inasmuch as the Trial Court has specifically found such to be the facts, this Court is precluded from going back of such findings, and further reference to the evidence is unnecessary.

The case of Meischke-Smith v. Wardell:

We have examined all of the cases involving the provisions of the 1917 and 1918 Revenue Acts, now under consideration, but have found no case where the Commissioner has ever undertaken to impose a tax or an additional tax upon the basis of any charge or charges other than that or those *actually made and collected* by the carrier. There are numerous cases where no charge or charges were made by the carrier and the Commissioner in such cases imposed a tax upon the basis of what would have been a proper charge, but none where the Commissioner has undertaken, for the purposes of taxation, to increase the charge or charges actually made.

There is, however, one case, *Meischke-Smith* v. *Wardell*, 286 Fed. 785, decided by the Ninth Circuit Court of Appeals, which, if not an absolute authority for the judgment of the Trial Court herein, and the affirmance thereof by the Circuit Court of Appeals, is highly persuasive of the correctness of said judgment, for the reason that the facts in said case are almost identical with the facts in the case at bar, and for the further reason that in said case the Commissioner did not attempt to impose a tax on any basis other than that of the charges which were actually made.

The first paragraph of the syllabus to the above case reads as follows:

"Where all of the stock of a pipe line corporation was owned by the corporation for whom the oil was transported, the officers of the two companies were the same to a large extent, and the accounts of the pipe line company were kept in the office of the holding corporation though its field force was separate, and it had a separate bank account, *the two corporations were distinct*, so that the pipe line company was liable for the war tax imposed by War Revenue Act, Oct. 3, 1917, Sec. 500, sub. (d), 1, *on the amount paid* for the transportation of oil by pipe line."

In the headnote to the above case, in describing the action, it is said:

"Action at law to recover the sum of $100,474.67, amount assessed and paid by the Valley Pipe Line Company as tax equivalent to five per centum *of the amount paid for transportation of oil by pipe line.*"

The following excerpts from the body of the opinion in said case throw further light on the nature of the action:

"This action was brought by the trustees of the Valley Pipe Line Company against Wardell, as collector of internal revenue, to recover $100,474.67, the aggregate of 14 monthly assessments of taxes levied, assessed, and collected from the Valley Pipe Line Company upon the transportation of oil by that company for the months of November and December, 1917, and January to December, inclusive, 1918, under subdivision (d) of section 500 of the War Revenue Act of October 3, 1917 (40 Stat. 314).

* * * * * * * * *

"*On the books of the Valley Pipe Line Company a monthly charge was made against the Shell Company of California for oil transported by its pipe lines. The aggregate of these monthly charges for the period from November 1, 1917, to December 31, 1918, amounted to such a sum that a tax equivalent to 5 per centum of the*

amount so stated is the sum of $100,474.67, the amount assessed and paid by the Valley Pipe Line Company to the collector of internal revenue."

With reference to the relationship between the Valley Pipe Line Company and the Shell Company, the Court, after an exhaustive examination of the authorities, and relying principally upon the cases of *Pullman Palace Car Co.* v. *Mo. Pac. Ry. Co.*, 115 U. S. 587, 29 L. ed. 499, and *Peterson* v. *C. R. I. & P. Ry. Co.*, 205 U. S. 364, 51 L. ed. 841, held that the two companies were to be regarded as separate and distinct entities; and this court in 263 U. S. 699, 68 L. ed. 513, denied an application therein for a writ of *certiorari*.

Most certainly the government should not undertake to establish in one case, as in the *Meischke Smith* case, simply because of the fact that the same will result in a tax liability, that a parent and a subsidiary corporation, under a certain state of facts, are to be considered as separate and distinct entities, and then in the case at bar, involving a similar state of facts, undertake to establish, for the same reason, that the Respondent and Cosden & Company are to be considered as a single entity.

In the Circuit Court of Appeals the Petitioner argued that in as much as Cosden & Company owned all of the stock of the Respondent, the two corporations should be regarded as a single entity. Such contention, however, does violence to the well settled general rule that a corporation is a legal entity, distinct from its individual members or stockholders. *Pierce* v. *National Bank of Commerce*, (C. C. A. 8) 13 F. (2d) 40, 47; *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 52 L. ed. 481; *Pullman Palace Co.*

v. *Mo. Pac. R. Co.*, 115 U. S. 587, 29 L. ed. 499; *Aiello* v. *Crampton*, (C. C. A. 8) 201 Fed. 891. To this general rule there are certain exceptions, as where to recognize such rule will justify wrong, protect fraud or defend crime, and in such cases the courts will disregard the fiction. *Pierce* v. *National Bank of Commerce*, *supra*; *McCaskell Co.* v. *United States*, 216 U. S. 504, 54 L. ed. 590. The facts in the case at bar, however, do not bring it within any recognized exception to the above general rule. See *Meischke-Smith* v. *Wardell*, *supra*.

A recapitulation of some of the important facts disclosed by the Record will be sufficient to establish the inapplicability of any of the exceptions to the above referred to general rule: The Respondent was at all times a corporation separate and distinct from Cosden & Company (R. 37); it at all times since its creation "continuously maintained and operated oil pipe lines in the State of Oklahoma" (R. 37); that except for the period from July 1, 1918, to March 31, 1919, it actually made and collected a charge for all of the oil which it carried for Cosden & Company (R. 25); that at all times from a date several months prior to November 1, 1917 (the effective date of the 1917 Revenue Act), to July 1, 1918, it actually charged, collected and received from Cosden & Company 5c per barrel for all oil carried by it (R. 25); that at all times from April 1, 1919, to the present time, or at least to the date of the trial of the case at bar, to-wit: the 30th day of April, 1930 (more than 8 years after the repeal of the Revenue Act of 1918), it actually charged, collected and received from Cosden & Company 10c per barrel for all oil carried by it for said Cosden & Company (R. 25); that except for the year 1920 its

charges against Cosden & Company for the carriage of oil, except where no charge whatsoever was made, were sufficient to take care of the cost and expense of carrying said oil (R. 25-26); that it carried oil for non-affiliated companies and actually made and collected charges therefor (R. 37-40); that for the period covered by the 1917 Revenue Act 37% of its business was with non-affiliated companies, and during the period covered by the 1918 Revenue Act 19% of its business was with non-affiliated companies (R. 27); that all of the money which was turned over to it by Cosden & Company for the purchase of oil for said Cosden & Company was kept by it in a separate account (R. 46); that it kept its record separate and distinct from the records of Cosden & Company (R. 54); that not all of its office employees were employees of Cosden & Company (R. 72); that none of its field employees were employees of Cosden & Company (R. 71); that all of its "run-tickets" were in its own name (R. 72); that it prepared its own "financial statement" (R. 48); that it made its own tax returns under the Revenue Act involved herein (R. 37-40); and that the Commissioner regarded it and Cosden & Company as separate and distinct entities (R. 62-66).

Under the authorities it is quite clear that in the absence of fraud the Courts will uphold contracts between a parent and a subsidiary corporation. *Smith v. Chase & Baker Piano Mfg. Co., et al.*, 197 Fed. (D. C., E. D. Mich., S. D.) 466; *State of Missouri, ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 67 L. ed. 981.

IV.

If there was any error in the judgment of the Trial Court with reference to the oil which was transported by the Respondent for Cosden & Company between November 1, 1917, and March 31, 1919, and for which the Respondent made no charge, it was in finding and adjudging that the Respondent was liable for a tax in connection therewith upon the basis of 10 cents per barrel instead of 5 cents per barrel, which, insofar as the Petitioner is concerned, was a harmless error. And the Circuit Court of Appeals erred in holding that the Commissioner's assessment in connection with this particular class of oil was legal.

With reference to the foregoing oil the trial court found and adjudged that the Respondent was liable for a tax in connection therewith, and that such tax should be based upon a charge of 10c per barrel, instead of 20c per barrel, and accordingly rendered judgment for the Respondent for $18,335.25, one-half of the Commissioner's assessment. The Circuit Court of Appeals held that this was error and required the Respondent to remit said $18,335.25.

In the Trial Court the Respondent contended, and still contends, that as to the above referred to oil it was liable for a tax, but that the Commissioner should have first determined, from actual bona fide rates which it had charged Cosden & Company, or other companies, for similar services, the charge which it would have received if it had made a charge for the carriage of said oil, and then imposed the tax upon said determined charge, and that under the circumstances the Commissioner had no right, power or authority in determining what charge would have been made by the Respondent, if it had received payment for the car-

riage of said oil, to consider the rates or tariffs of other pipe line companies.

A comparison of the corresponding sections of the 1918 Act with the 1917 Act shows the elimination of a number of the ambiguities in the 1917 Act. The doubt whether the law applies to private carrier was eliminated in the 1918 Act by expressly making the law applicable to private carriers. The ambiguity as to whether a carrier which had received payment for transportation could be held liable for more than the percentage based on the amount paid was eliminated. There is in the 1918 Act not a word indicating any right of the Government to collect on the basis that a higher rate should have been charged.

The question then relates to the liability of a carrier that carried oil without receiving any payment. The latter part of Section 501 of the 1918 Act says that in such case "the person transporting by pipe line shall pay a tax equivalent to the tax *which would be imposed if such person received payment for such transportation.*"

The Act continues by providing how the tax shall be computed. The Act reads as follows:

> "In case no charge for transportation is made, by reason of the ownership of the commodity transported, or for any other reason, the person transporting by pipe line shall pay a tax equivalent to the tax *which would be imposed, if such person received payment* for such transportation, and if the tax cannot be computed *from actual bona fide rates* or tariffs" (referring undoubtedly to the rates or tariffs of the carrier which has made no charge) "it shall be computed *(1)* on the basis of the rates or tariffs of *other* pipe lines for like services, as determined by the Commissioner, or *(2)* if no such rates or tariffs exist, on the basis of a reason-

able charge for such transportation, as determined by the Commissioner."

Assuming that this part of the Act is valid, it is apparent that it contemplates three methods of determining the rate, not in the alternative, but in the order stated in the Act. In other words, it shall be computed *(1)* from the actual bona fide rates *or* tariffs of the carrier involved. If it cannot be so computed, which, of course, is a situation only where there have been no bona fide rates collected *or* tariffs promulgated by the carrier involved, it is to be computed *(2)* on the basis of the rates or tariffs of other pipe lines for like services, as determined by the Commissioner. And, if there are no rates or tariffs of this character, which is the situation whenever there is no other carrier which has any rates or tariffs, or no one whose business is so similar as to furnish a standard, then *(3)* on the basis of a reasonable charge for such transportation, as determined by the Commissioner.

The language makes it clear that these methods of determining the rate do not give an alternative of action to the Commissioner. He has no choice of methods; if a rate can be determined by the method prescribed in "*(1)*" he must follow that method to the exclusion of the others. If the particular carrier has not been paid for the transportation of any oil, then, and only then, is the Commissioner authorized to resort to the method specified in "*(2)*". But it is only where other pipe line companies have collected rates or promulgated tariffs for like services that method "*(2)*" can be resorted to. The Act, however, recognizes that there may not be other pipe line companies which furnish a standard, in which even resort to method "*(3)*" may be

made. But the Act makes it clear that the Commissioner cannot resort to method "*(3)*" if either of the former two methods is available.

In the instant situation the Commissioner was able to determine according to the method specified in "*(1)*" the charge which the Respondent would have made for the carriage of the above referred to 3,666,048.39 barrels of oil, if it had received payment therefor. In other words, the Respondent, during the time involved herein, received payment in numerous instances, and not only from Cosden & Company, but from various and sundry non-affiliated companies, for services similar to that rendered by it in transporting the aforesaid 3,666,048.39 barrels of oil. And we, therefore, insist that in assessing the tax in connection with the aforesaid 3,666,048.39 barrels of oil, the Commissioner was prohibited by the terms of the Act from resorting to the above specified methods "*(2)*" or "*(3)*".

It is to be noticed that section 501 in the 1918 Act speaks of rates or tariffs in the alternative. The Act, in terms, applies to private carriers, as well as common carriers, and, hence, the distinction between rates *or* tariffs, for it is well known that a private carrier does not promulgate tariffs, but does charge rates fixed by contract. The Act would not be workable as to private carriers unless rates were differentiated from tariffs, and hence the differentiation is made.

The word "rates" has a well recognized meaning, which is different from that conveyed by the word "tariff." This distinction between "rates" and "tariffs" finds expression in *Ft. Worth & D. C. Ry. Co.* v. *Cochman*, 50 S. W. (Tex.) 1009, and *Holland* v. *Chicago, etc.*, 123 S. W. (Mo. App.) 987.

The last case gives expression to a fact which we all know, that "tariff rate can mean nothing but a regular schedule rate, as distinguished from a special rate." That "rate" as used in a statute intended to apply both to private and common carriers had a different meaning from "tariff" is a matter of common sense, and is also shown by numerous uses of the word "rate."

Thus, in *Raun* v. *Reynolds*, 11 Cal. 14, the court speaks of rate of interest and says that the word has reference "to the percentage or amount of interest, and not to the manner of computing." Rate is defined by Webster to be "the price or amount stated or fixed on anything."

Let us call the attention of the court to a very common use of the word "rate." It is commonly used in speaking of rates of exchange, meaning, of course, the fixed rates charged from day to day. In the instant situation the Congress very clearly used the word "rate" in contradistinction to the word "tariff." It had to use the word in such a sense in order to make the Act applicable to private carriers.

Hence, we contend that there was only one method of fixing the charge which would have been made by the Respondent on the carriage of the aforesaid oil for which no payment was made, had it received payment therefor. The only available method was to consider the rates paid by the rate-paying customers of said company.

With the foregoing methods in mind, let us first see just how the Commissioner actually assessed the aforesaid tax of $36,666.50, in connection with the aforesaid 3,666,048.39 barrels of oil, and then see how easy it was for him to have assessed the tax upon the basis of rates or charges which the Respondent actually charged against, and col-

lected from, both Cosden & Company and various and sundry non-affiliated companies.

The letter of August 2, 1922, from the Commissioner of Internal Revenue to the Respondent, which said letter was identified as Respondent's "Exhibit 2" and introduced in evidence, and which appears at pages 54-56 of the Record, discloses the basis upon which the additional assessments involved herein were made. From said letter it appears that said additional assessments were made on the basis of a charge of 20c per barrel, and that said 20c was composed of a gathering charge of 12½c and a transporting or trunk line charge of 7½c.

The Trial Court's Findings of Fact and Conclusions of Law and the Agreed Statement of Facts herein conclusively establish that between November 1, 1917, and March 31, 1919, the Respondent transported for Cosden & Company 645,120.64 barrels of oil, and charged and received therefor 5c per barrel. (R. 37-38). That during the same period of time the Respondent transported for Cosden & Company 2,022,248.41 barrels of oil, and charged and received therefor 5c per barrel. (R. 37-38). That between April 1, 1919, and December 31, 1921, the Respondent transported for Cosden & Company 20,644,020.34 barrels of oil, and charged and received therefor 10c per barrel. (R. 38-39). That of all the oil transported by the Respondent between November 1, 1917, and March 31, 1919, the oil carried for Cosden & Company represented 63% of the total amount of the oil carried by the Respondent during said period of time, the other 37% of said oil being carried for outside or non-affiliated companies. (R. 27) That of the total amount of oil carried by the Respondent between

April 1, 1919, and December 31, 1921, the oil carried for Cosden & Company represented 81% of such oil, the remaining 19% having been carried for outside and non-affiliated companies. (R. 27) That for all, or practically all, of the oil carried during the aforesaid periods of time for outside and non-affiliated companies, the Respondent made various and sundry charges, and it is significant to note that since the commencement of this action the Commissioner has refunded practically all of the additional assessments in connection with the carriage of the aforesaid oil for outside and non-affiliated companies, thus removing from the case any question as to the impropriety of the charges made by the Respondent against said outside and non-affiliated companies in connection with the carriage of such oil. (R. 37-41) That the average of all charges made by the Respondent for the carriage of all oil carried by it between November 1, 1917, and March 31, 1919, for all outside or non-affiliated companies, was 13c per barrel. (R. 26) That the average of all charges made by the Respondent for the carriage of all oil carried by it from April 1, 1919, to December 31, 1921, for all outside or non-affiliated companies, was 16.4c per barrel. (R. 26) That the average of all charges made by the Respondent for the carriage of all oil carried by it from November 1, 1917, to March 31, 1919, for all outside or non-affiliated companies, and for the 645,120.64 barrels of oil owned by Cosden & Company and carried by Respondent for it during said period, and in connection with which the Commissioner has since the commencement of this action refunded the additional assessment made in connection therewith, was 11.74c per barrel. (R. 27, 37, 38) That the average of all charges made by the Respondent for the carriage of all oil from November

1, 1917, to March 31, 1919, for all companies, whether affiliated or non-affiliated, and including the aforesaid 645,120.64 barrels of oil owned by Cosden & Company, was 9.5c per barrel. (R. 26) And that the average of all charges made by the Respondent for the carriage of all oil, from April 1, 1919, to December 31, 1921, for all companies, whether affiliated or non-affiliated, was 11.17c per barrel. (R. 26)

In the light of the foregoing facts we contended in the Trial Court and in the Circuit Court of Appeals that the Commissioner could easily, and should, have ascertained and determined the charge which the Respondent would have made for the carriage of the 3,666,048.39 barrels of oil now under consideration, if it had received payment therefor, by and according to the above specified method *"(1)"* or, in other words, on the basis of the actual rates and charges of the Respondent referred to in the preceding paragraph, and in doing so the Commissioner, instead of using the 20c rate, which was used by him, would have used some one of the following rates, to-wit:

(a) The 5c rate which was actually charged and received by the Respondent from Cosden & Company during the identical period involved, and which the Commissioner admits was a proper charge as to 645,120.64 barrels of oil carried, and in connection with which he has made the above referred to refunds; or,

(b) The 10c rate, which was actually charged and received by the Respondent from Cosden & Company during the period from April 1, 1919, to March 31, 1921; or,

(c) Some one of the above referred to average charges which were actually made and collected by the Respondent

during the period from November 1, 1917, to March 31, 1919; or,

(d) Some one of the above referred to average charges which were actually made and collected by the Respondent during the period from April 1, 1919, to December 31, 1921.

In the Trial Court we contended that the Commissioner should have applied to the above referred to 3,666,048.39 barrels of oil, for which no charge was made, a charge of 5c per barrel; however, the Trial Court found and adjudged that a charge of 10c per barrel was the proper basis for assessing the tax, and accordingly rendered judgment for the Respondent for one-half of the assessment in connection with said oil, said additional assessment having been predicated upon a charge of 20c per barrel. The Circuit Court of Appeals held that this was error and that the assessment was entirely legal.

We are still of the opinion that the tax in connection with the above referred to oil should have been based upon a charge of 5c per barrel, but if the Trial Court was in error in finding and adjudging the proper charge for taxation was 10c per barrel, instead of 5c per barrel, such error, insofar as the Petitioner is concerned, was harmless, and inasmuch as the Respondent did not appeal from the judgment of the Trial Court, it is precluded thereby.

There were no rates or tariffs of other pipe line companies sufficient to furnish a basis for imposing a tax in connection with the oil which was carried by Respondent.

According to the evidence and the agreed facts the Trial Court found that the Respondent was engaged wholly in intrastate business, and that its principal business was that of gathering oil to the refinery of Cosden & Com-

pany, at Tulsa, Oklahoma (R. 24-28); that the Respondent's system of pipe lines constitutes a "gathering system," and nothing more, and said system was only comparable to the "gathering system" or "gathering lines" of common carrier pipe lines, and that the service or services rendered by the Respondent as compared with the service or services rendered by common carrier pipe lines was nothing more than a "gathering" service (R. 29); that there was no pipe line company operating in the vicinity of Respondent's pipe lines which had any rates or tariffs sufficient to furnish the basis for imposing either under the 1917 or the 1918 Revenue Act any transportation tax for the carriage of oil by the Respondent (R. 32); and that common carrier pipe lines operated both "gathering lines" and main or trunk lines (R. 40-41).

It, therefore, requires no argument to establish that the business of the Respondent was so different from that of other pipe line companies as to furnish no basis whatever for the comparison of one with the other in order to determine what rate the respondent should have charged for oil transported for Cosden & Company, and for which no charge was made.

In *Florida East Coast R. R. Co.* v. *United States*, 234 U. S. 167, 58 L. ed. 1267, this Court had before it the question of rates fixed by the Interstate Commerce Commission. The opinion, coupled with orders of the Interstate Commerce Commission set out in the opinion, shows that the railroads in Florida below Jacksonville, were regarded as being engaged in a gathering service rather than a main line service, insofar as pineapples, citrus fruits and vegetables were concerned. The East Coast Railroad Company

was doing nothing else since its line terminated at Jacksonville, but other lines involved in the hearing before the Commission furnished both a gathering service south of Jacksonville and the truck line service north. The rate, insofar as it applied to the East Coast Railway Company, was held invalid, on the theory that a railroad merely doing a gathering service was to be differentiated from a railroad doing both a gathering and a trunk line service, and that said differentiation had not been made by the Commission. The case is important in showing the approval of this Court of the differentiation between trunk line and gathering service, and also that by reason of said difference in conditions a rate for a gathering service based on evidence as to a *combined* gathering and trunk line service will not, as a matter of law, justify the fixing of a gathering rate.

The case of *Northern Pacific Railroad Co.* v. *Department of Public Works*, 268 U. S. 39, 69 L. ed. 836, involved the validity of a rate fixed for intrastate carriage of logs by a Washington Commission. It appeared that the basis for the fixing of the rate on logs was found in figures relating to all of the transportation of the several railroad companies involved. It was held that this basis was insufficient as a matter of law, and that the rate should have been determined by the facts relating to the carriage of logs in the state. The court said:

> "The Department's error was fundamental in its nature. The use of this factor in computing the operating cost of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion."

The above case is valuable in showing that a conclusion of fact reached by an administrative body charged with

fixing rates will be reviewed by the courts and will be held invalid when based upon inference from facts which should not have been considered. Upon the same principle, facts as to rates for a gathering service performed only in connection with a trunk line service do not furnish a proper basis for the taxation of a gathering service performed independently of any other service.

If the Commissioner in determining, for purposes of taxation, the charge which the Respondent would or should have made for transporting the oil which it carried for Cosden & Company, without making any charge therefor, if it had received payment therefor, had any right, power or authority to use or consider the rates or tariffs of other pipe line companies, he had no right, power or authority to use or consider said rates or tariffs, save and except insofar as the same applied to "gathering charges."

The foregoing proposition is predicated upon the fact, as found by the Trial Court, that the Respondent's system of pipe lines was nothing more than a gathering system, and that the service rendered by it was nothing more than a gathering service; and, in advancing and arguing said proposition we do so without in any wise waiving the argument which we have heretofore made to the effect that the Commissioner, in determining or ascertaining the charge which the Respondent should, or would, have made for the carriage of oil, for which it made no charge, if it had received payment therefor, had no right, power or authority to consider the rates or tariffs of any pipe line company other than the Respondent.

We have seen from the letter of August 2, 1922, from the Commissioner to the Respondent, advising it of the additional assessments involved herein, that said additional

assessments were based upon a charge of 20c per barrel, which was composed of a gathering charge of 12½c per barrel and a transporting or trunk line charge of 7½c per barrel. (R. 54-56)

In addition to the foregoing it will also be recalled that the Trial Court found that the usual and customary "gathering charge" of common carrier pipe lines operating in the vicinity of the Respondent's pipe lines during the period from November 1, 1917, to December 31, 1921, was from 12c to 12½c per barrel. (R. 28)

It, therefore, necessarily follows that from the Findings of the Trial Court that the Respondent's system of pipe lines constituted a gathering system and nothing more, and that said system was only comparable to the gathering system or gathering lines of common carrier pipe lines, and that the service or services rendered by the Respondent, as compared with the services rendered by common carrier pipe lines was nothing more than a gathering service, that so much of the assessments involved herein as is predicated upon the above referred to transporting or trunk line charge of 7½c per barrel was erroneous.

The Findings of the Trial Court to the effect *(a)* that Respondent's system of pipe lines constituted nothing more that a gathering system; *(b)* that the service rendered by the Respondent, as compared with the services rendered by common carrier pipe line companies were nothing more than gathering services; and *(c)* that the usual and customary "gathering charge" of common carrier pipe lines operating in the vicinity of Respondent's pipe lines was from 12c to 12½c per barrel during the period involved herein, are, of course, conclusive. However, we would call

the court's attention to Respondent's "Exhibit 6", being a published tariff of the Empire Pipe Line Company, in which it is recited as follows:

> "The rates published in this tariff are for the *Interstate* Transportation of Crude Petroleum by the Carrier's trunk pipe line,"

and then follows a list of tariff stations from which and to which oil will be transported and opposite each is given in cents the price per barrel for such transportation, and it is then recited as follows:

> "In addition all oil tendered for shipment in Kansas and Oklahoma, accessible to the gathering lines of the Company, will be subject to a further gathering charge of 12c per barrel, except," etc.

In the preamble to said tariff, the following appears:

> "This company will undertake the *interstate* transportation of crude petroleum only, by trunk pipe line, receiving and delivering the same through its own facilities and not otherwise, subject to the following regulations:" etc. (R. 67-70)

The court will note from the foregoing tariff as well as the tariffs which were introduced by the Petitioner, that the service covered by each and all of said tariffs is *an interstate transportation of crude oil*, and that the charges or rates specified therein are for a *combined* gathering service and a trunk line service.

Frankly, it is difficult to distinguish between gathering lines and trunk lines. In fact, almost as difficult as it is to distinguish between a creek and a river. Neither the size nor the length of the lines nor the amount of oil carried seems to be any criterion for distinguishing between the

two. However, the evidence itself discloses that in the case of gathering lines it is the common practice to receive and take oil at any point along said lines where the same can be obtained, but in the case of a trunk line it is very unusual to receive or take oil at other than fixed and definite points, which are designated as tariff stations; and in the light of the Agreed Statement of Facts and the evidence herein, the Trial Court was undoubtedly correct in its conclusion that the Respondent's system of pipe lines was nothing more than a gathering system, and that it rendered no service in connection therewith that could be said to be anything other than a gathering service.

On this branch of the case we conclude that the Circuit Court of Appeals should not have modified the judgment of the Trial Court with respect to the class of oil under consideration, and, in any event, it was not justified in disregarding the Findings of the Trial Court that Respondent's services in connection with said oil was a "gathering" service and that the usual and customary charge therefor was 12c or 12½c per barrel. In other words, under such Findings, 12½c per barrel was the maximum basis of the tax.

V.

If there was any error in the judgment of the Trial Court with reference to the 99,590.31 barrels of oil which was sold by Cosden & Company to the Pierce Oil Company, it was in finding and adjudging that the Respondent was liable for a tax in connection therewith upon the basis of 5c per barrel and in not holding that the Respondent was not liable for any tax whatsoever in connection with such oil, which, insofar as the Petitioner is concerned, was a

harmless error. And the Circuit Court of Appeals erred in holding that the tax with respect to this particular oil should have been based upon a gathering charge of 12½c.

In the Circuit Court of Appeals the Respondent, relying upon the case of *Alexander, Collector*, v. *Carter Oil Company*, 53 F. (2d) 964, and the Trial Court's Second Finding of Fact (R. 24) and Sixth Conclusion of Law (R. 31-32) and the uncontradicted testimony with reference to the above referred to oil (R. 42-45), contended that it never at any time transported said oil within the meaning of the Revenue Act of 1917, or, in other words, that the mere gathering of said oil into tanks upon the Jeannette Richards Farm, from which it was produced, did not constitute transportation within the meaning of said Act. However, both the Trial Court and the Circuit Court of Appeals concluded that it did. Then the Trial Court held that the tax in connection therewith should have been based upon a charge of 5c per barrel, *the rate and charge in effect as between Respondent and Cosden & Company at the time of the carriage of said oil*, instead of 20c per barrel, the basis employed by the Commissioner. If this oil was transported within the meaning of the 1917 Act the argument which we have made under the preceding proposition is applicable and we concede that the Trial Court was correct in using 5c per barrel as a basis for the tax. The Circuit Court of Appeals took the position that while said oil was transported by Respondent, it was only "gathered," and that the usual and customary gathering charge of 12½c per barrel was the proper basis for the tax. If the argument advanced under the preceding proposition is sound, and conceding that this oil was transported, the Trial Court's basis of 5c per barrel and not the

Circuit Court of Appeals's basis of 12½c, was the correct basis.

VI.

If this Court should conclude that both the Trial Court and the Circuit Court of Appeals erred with respect to the basis of the taxes in connection with any or all of the four classes of oil involved herein and that the usual and customary charges for the carriage of such oil was the correct basis, then we submit that under the Trial Court's Twenty-Fifth and Twenty-Eighth Findings of Fact the maximum basis for the tax is 12½c.

The Trial Court's Twenty-Fifth and Twenty-Eighth Findings of Fact are as follows:

> "*(25)* The Court finds that the usual and customary 'gathering charge' of common carrier pipe lines, operating in the vicinity of the plaintiff's pipe lines, and during the period from November 1, 1917, to December 31, 1921, was from 12 cents to 12½ cents per barrel. (R. 28)
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> • • • • • • • •
>
> "*(28)* The Court finds that plaintiff's system of pipe lines constitutes a gathering system and nothing more, and said system is only comparable to the 'gathering system' or 'gathering lines' of common carrier pipe lines, and the service or services rendered by the plaintiff, as compared with the service or services rendered by common carrier pipe lines, is nothing more than a gathering service." (R. 29)

Inasmuch as this court is concluded by the above Findings of Fact it follows that, even if the contention of the Petitioner to the effect that the usual and customary or "commercial" charges must be applied to each and all of

the four classes of oil involved herein, the maximum basis for imposing a tax on such oil, under both the Revenue Acts involved, is 12½c per barrel. From this we see no escape.

VII.

Specific Answers to Petitioner's Contentions.

The Petitioner's references to the charges which Respondent made against Cosden & Company for the carriage of its oil as a "bookkeeping charge" and as an "arbitrary and inadequate bookkeeping entry" are wholly unjustified in the light of the Trial Court's specific Findings: *(a)* that all of the oil which Respondent carried for Cosden & Company was owned by Cosden & Company and not by the Respondent; *(b)* that the Respondent actually made and collected a charge of 5c and 10c per barrel, respectively, for all of the oil carried by it for Cosden & Company, except the oil which was carried between July 1, 1918, and March 31, 1919; and *(c)* that such charges were made in good faith and, under the circumstances, were reasonable (R. 25, 26, 29-31).

Petitioner also repeatedly characterizes Respondent's charges as being "nominal." Webster's New International Dictionary defines "nominal" as follows: "Existing in name only; not real or actual; merely named, stated or given, without reference to actual condition; even with the implication that the thing named is so small, slight, or the like, in comparison with what might properly be expected as scarcely to be entitled to the name; a nominal price." Most certainly charges of 5c and 10c per barrel, which produced, respectively, $5,022.29 and $165,152.28 in taxes, cannot be said to be "nominal".

For the same definition of the word "nominal" see *Sweet v. United States*, 68 Ct. Cl. 109, 118; *Feeders' Supply Co. v. Commissioner of Internal Revenue*, (C. C. A. 8) 31 F. (2d) 274, 276; *Strayer's Business College v. Commissioner of Internal Revenue*, (C. C. A. 4) 35 F. (2d) 426, 429; and *Lehman v. Tate*, (C. C. A. 4) 38 F. (2d) 20, 23.

It does not necessarily or logically follow from the fact that the Respondent charged Cosden & Company less than it charged non-affiliated companies, or the fact that the charges which it made to Cosden & Company were less than the charges which were made by common carrier pipe line companies for similar services, that the same was "by reason of its affiliation with the owner of the oil carried." When we consider that Cosden & Company was the owner of an unusually large refinery and that Respondent, exclusively, continuously, year in and year out, since its incorporation, carried all of the oil used at said refinery, it is but natural to assume that even if there had been no connection whatsoever between the Respondent and Cosden & Company, the latter would have been able to have contracted with the former, which was not a common carrier and hence not subject to rate regulation, for the carriage of its oil at a much lower rate than would be expected of a common carrier pipe line carrying oil for the owner thereof. According to the Record 63% of all of the oil which was carried by the Respondent during the period covered by the 1917 Revenue Act and 81% of all of the oil carried by it during the period covered by the 1918 Revenue Act belonged to and was carried for Cosden & Company (R. 27). Moreover, the fact that the Respondent transported oil for non-affiliated companies for as low as 7c per barrel, and the further

fact that the average of all charges which the Respondent made for the carriage of oil for non affiliated companies was much less than what the Commissioner concluded and the Petitioner contends was the usual and customary charge for similar services, conclusively establish that the assumption that except for its affiliation with Cosden & Company it would have charged said company 20c per barrel for the carriage of its oil is unwarranted (R. 26, 37-40).

An independent carrier, unless prohibited by statute, might, by reason of a long term contract with a large refinery for the carriage of unusually large quantities of oil, contract to carrying such oil at the actual cost of the services to be rendered, and, as the sole result thereof, reap large profits from the carriage of oil for other parties. In other words, such a carrier, except for the assumed contract, might be wholly unable to obtain sufficient oil for carriage at sufficient charges to reap any profit. And such is the case at bar. To illustrate, it probably costs a taxi driver no more to transport four passengers than it does to transport one, and, therefore, a taxi driver might transport one passenger a certain distance for $1.00 and lose money, whereas, by transporting four passengers the same distance at 50c each, he might make an excellent profit. Likewise a carrier of oil may be able to transport 2,000,000 barrels of oil at substantially the same cost and expense of carrying 1,000,000 barrels. And, as in the case of the taxi driver, such carrier, in transporting 1,000,000 barrels of oil at 5c per barrel, might lose money, whereas it might carry 2,000,000 barrels of oil at 3c per barrel and reap a handsome profit. Therefore, laying aside the relation between the Respondent and Cosden & Company, it is quite clear that it might have been

excellent business judgment on the part of the Respondent, inasmuch as it was carrying all of Cosden & Company's oil, year in and year out, to carry such oil at the actual cost of the services rendered. And no doubt Cosden & Company would have been able, in the absence of the existence of the Respondent, to have obtained a contract from a non affiliated pipe line company, whose rates were not subject to regulation, for the carriage of all of its oil, year in and year out, at a figure considerably less than that customarily charged by common carrier pipe line companies.

The burden of Petitioner's argument is that it was the purpose of Congress, under the Revenue Acts under consideration, to provide a measure of universal and equal operation and that it intended to base the tax *in all cases* upon the usual and customary charges for the carriage of oil; or, to use the words of the Petitioner, upon the "commercial rates". That such is not the case is to us too plain for argument. In the 1917 Act there are clearly the following bases for determining the amount of the tax: *(1)* "the amount paid for the transportation"; and, *(2)* the amount which the carrier would have received if payment had been made for the transportation, determinable by the following methods: *(a)* the amount shown in the rates or tariffs of the carrier making the transportation; and *(b)* "the rates or tariffs of other carriers for like services." Likewise the 1918 Act clearly provides the following bases for determining the amount of the tax: *(1)* "the amount paid for the transportation", also referred to as the "charge for transportation"; *(2)* the "actual bona fide rates or tariffs" of the carrier making the transportation; *(3)* "the rates or tariffs of other pipe lines for like services"; and, *(4)* the

"reasonable charge for such transportation." Obviously each and all of these bases do not refer to one and the same thing. *If, as is contended by Petitioner, Congress intended to base the tax in all cases upon the usual and customary charges, or, the commercial rates, it would have been a very easy matter to have said: "In all cases of transportation of oil by pipe line a tax in a certain per centum of the commercial rates, or the usual and customary charges made therefor shall be imposed."* In view of the language employed, we most certainly cannot bring ourselves to believe that Congress entertained any such intention as is attributed to it by the Petitioner.

Suppose that a carrier, by reason of its peculiar situation, should actually charge and collect for the transportation of oil for a producer thereof an unusually *high* charge, most certainly the Government would insist upon the collection of a tax based upon the charge actually made and collected, and not upon the basis of the commercial rates, or the usual and customary charges therefor.

It is suggested by Petitioner that the term "no charge" means no adequate and reasonable charge. Such, we think, is not the case. In fact, it is very evident to us that so long as a charge was actually made and collected, in good faith, and without any fraud, Congress was not concerned with whether the same was adequate or reasonable. No other construction can be deducted from the language employed. And, furthermore, the Record herein discloses that the Commissioner, in making refunds as to all of the additional assessments in connection with the oil carried by the Respondent for non-affiliated companies and also the 645,120.64 barrels of oil carried by it for Cosden & Company, in which

cases charges as low as 5c per barrel were made, was of the opinion that where a charge was actually made and collected, in good faith, and without fraud, he was not concerned with whether the same was adequate or reasonable, and in assessing the tax was limited to the charge actually made and collected.

In order that we may not be misunderstood, we reiterate that we do not contend that where a charge for the carriage of oil was purely fictitious the Commissioner was limited to such change in imposing a tax. However, that is not this case.

In support of his contention that Congress, in enacting the provisions of the 1917 and 1918 Revenue Acts involved, intended to base the tax on commercial rates, the Petitioner relies upon *Hellmich* v. *Missouri Pacific Railroad Company*, 273 U. S. 242, 71 L. ed. 628; *Western Union Tel. Co.* v. *Delaware, L. & W. R. Co.*, 282 Fed. 925; *Erie R. Co.* v. *United States*, 54 F. (2d) 173; *Colgate & Co.* v. *United States*, 66 C. Cls. 510; *United Profit Sharing Corp.* v. *United States*, 70 C. Cls. 788; and *United Cigar Stores* v. *United States*, 72 C. Cls. 463. None of said cases, however, supports this contention. The particular provisions of the Revenue Acts under consideration were not involved in any of said cases. The principal question decided in each of said cases was that under the particular facts therein there was a "charge" for services or a "sale" of merchandise, and then the court, as it was practically forced to do under the facts involved, used as a basis for the tax the customary charge for the services involved, established by the parties themselves, or the market value of the merchandise. In none of said cases

was there any attempt, as in the case at bar, to raise any money charge which had been actually made and collected.

The Petitioner also cites the case of *Standard Oil Co. v. McLaughlin*, (C. C. A. 9) decided September 16, 1933, and reported in 33[illegible] C. C. H., par. 9513, but we find nothing in said case which supports his position. On the contrary, there is much in said case which supports the argument of Respondent. For instance, the court therein said:

> "As a matter of fact, on September 28, 1920, the Commissioner had certified an assessment of taxes covering the taxes due from April 1, 1919, to May 31, 1920, and payment therefor had been demanded. This assessment was based upon the cost of transporting oil as ascertained from the books of the appellant. This cost varied from month to month and from place to place but the Commissioner acted upon it and made an assessment upon the basis of such costs. This determination was in effect a decision that the actual cost of transportation of oil was a reasonable amount to be charged for such transportation."

Conclusion.

If the judgment of the Circuit Court of Appeals is to be disturbed, we respectfully submit that the action of this court should be limited to modifying said opinion so as to conform with the judgment of the Trial Court, thereby relieving the Respondent from its remittitur of $18,708.96.

Respectfully submitted,

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